

FILED IN UNITED STATES DISTRICT  
COURT, DISTRICT OF UTAH

JUN 01 2010

D. MARK JONES, CLERK  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMES M. DAVIS; ANDREA E. DAVIS, )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 TOP FLIGHT ACADEMY, LLC, dba TOP )  
 FLIGHT ACADEMY, a Utah Limited )  
 Liability Company; CLAYTON )  
 JUSTENSEN; CINDY JOHANSEN; DOES 1 )  
 through 10, inclusive, )  
 )  
 Defendants. )

2:10-cv-00117-GEB-EFB

ORDER GRANTING EACH  
DEFENDANT'S MOTION TO TRANSFER  
VENUE\*

Defendants Top Flight Academy, LLC ("Top Flight") and Clayton Justensen filed a motion on April 1, 2010, seeking to transfer this case to the United States District Court for the Central Division of Utah under 28 U.S.C. § 1404(a). (Docket No. 9.) Defendant Cindy Johansen filed a separate motion to transfer in which she "joins and incorporates by reference" the arguments in Top Flight and Justensen's motion. (Johansen Mot. to Transfer 1: 26-28) (Docket No. 17.) Plaintiffs filed a single opposition brief opposing both transfer motions, primarily arguing that their son and main witness, Shawn Berwind, resides in the Eastern District of California. Plaintiffs' claims relate to their allegation that their son Shawn began a sexual

\* This matter is deemed to be suitable for decision without oral argument. E.D. Cal. R. 230(g).

1 relationship with his Top Flight instructor, Defendant Johansen, while  
2 enrolled at Top Flight.

3 **I. BACKGROUND**

4 Plaintiffs allege in their complaint that on or about  
5 October 31, 2007, Plaintiffs entered into a written and oral  
6 agreement, under which they enrolled their son Shawn at Top Flight.

7 (Compl. ¶ 5.) Top Flight is a "Utah-licensed residential treatment  
8 center" located in Mount Pleasant, Utah. (Id. ¶¶ 5, 51.) Plaintiffs  
9 allege that while Shawn was enrolled at Top Flight, he met Defendant  
10 Johansen, an instructor at Top Flight, and began an inappropriate  
11 sexual relationship with her. (Id. ¶¶ 7, 12.)

12 Plaintiffs allege that Shawn left Top Flight and returned to  
13 his home in Sacramento in early July 2008. (Id. ¶ 17.) After Shawn's  
14 return, Plaintiffs allege they discovered a letter Johansen wrote  
15 Shawn, which "read like a love letter . . . ." (Id. ¶ 19.)

16 Plaintiffs also allege they also discovered emails Johansen sent Shawn  
17 that were "overly familiar and flirtatious." (Id. ¶ 23.) Plaintiffs  
18 allege that in one e-mail, Johansen suggested that Shawn and his  
19 friends drive from Sacramento to Utah to receive tutoring. (Id.) In  
20 December 2008, Shawn allegedly ran away from home on several  
21 occasions. (Id. ¶25.) During one absence, Plaintiffs allege Shawn  
22 told them he was in Utah. (Id.)

23 Plaintiffs further allege they wrote Top Flight a letter  
24 dated December 5, 2008, in which they demanded reimbursement for the  
25 tuition and expenses they incurred to enroll Shawn at Top Flight.  
26 (Id. ¶ 29.) Defendant Justensen, the Executive Director and part  
27 owner of Top Flight, allegedly refused the reimbursement request.  
28 (Id. ¶¶ 6, 30.)

1           Thereafter, Plaintiffs filed their complaint in this action,  
2 in which they seek damages under Title IX of the Education Amendments  
3 of 1972, 20 U.S.C. § 1681 *et seq.*, and allege the following state  
4 claims: negligence, negligent supervision and hiring, breach of  
5 contract and breach of the covenant of good faith and fair dealing.

## 6                           **II. LEGAL STANDARD**

7           Under 28 U.S.C. § 1404(a), "a district court may transfer  
8 any civil action to any other district or division where it might have  
9 been brought" "[f]or the convenience of [the] parties and witnesses,  
10 [or] in the interest of justice . . . ." "[A] two-step analysis [is  
11 used under section 1404(a)] to determine whether a transfer is  
12 proper." Gonsalves v. Infosys Techs., LTD, No. C 09-04112 MHP, 2010  
13 WL 1854146, at \*4 (N.D. Cal. May 6, 2010). "The threshold question  
14 under section 1404(a) requires the court to determine whether the case  
15 could have been brought in the forum to which the transfer is sought.  
16 If venue would be appropriate in the would-be transferee court, then  
17 the court must make an individualized, case-by-case consideration of  
18 convenience and fairness." Id. (quotations and citations omitted).  
19 In deciding whether transfer is convenient and fair, "multiple  
20 factors" are weighed, including "(1) the location where the relevant  
21 agreements were negotiated and executed, (2) the state that is most  
22 familiar with the governing law, (3) the plaintiff's choice of forum,  
23 (4) the respective parties' contacts with the forum, (5) the contacts  
24 relating to the plaintiff's cause of action in the chosen forum, (6)  
25 the differences in the costs of litigation in the two forums, (7) the  
26 availability of compulsory process to compel attendance of unwilling  
27 non-party witnesses, and (8) the ease of access to sources of proof."  
28 Jones v. GNC Franchising, Inc., 211 F.3d 495, 498-99 (9th Cir. 2000)

(citations omitted). Additionally, a contractual forum selection clause and any relevant public policy of the forum state are "significant" factors in this analysis. Id. at 499. However, "[n]o single factor is dispositive, and a district court has broad discretion to adjudicate motions for transfer on a case-by-case basis." Ctr. for Biological Diversity v. Kempthorne, No. C 08-1339 CW, 2008 WL 4543043, at \*2 (N.D. Cal. Oct. 10, 2008) (citations omitted). "The party seeking transfer for convenience . . . generally bears the burden to show that another forum is more convenient and serves the interest of justice. The inquiry is not whether one venue or another would be the best venue; but rather whether there is a venue that is more convenient." F.T.C. v. Watson Pharms., Inc., 611 F. Supp. 2d 1081, 1086 (C.D. Cal. 2009) (citing GNC Franchising, 211 F.3d at 499).

### III. DISCUSSION

#### A. This Action Could Have Been Filed Initially in the United States District Court for the Central Division of Utah

Defendants argue transfer to the United States District Court for the Central Division of Utah is permissible because Plaintiffs could have initially filed their complaint in that judicial district. (Top Flight Mot. to Transfer 5:21-6:5.) Plaintiffs do not dispute that this case could have initially been filed in the United States District Court for the Central Division of Utah.

#### B. Multiple Factors Weigh in Favor of Transferring this Action to the United States District Court for the Central Division of Utah

##### 1. Forum Selection Clause

Defendants primary argument supporting transfer is that a clause in the contract entered into between Plaintiff James Davis and Top Flight is a "forum selection clause" which "designat[es] that any

1 dispute between the parties . . . [be] subject to the jurisdiction of  
 2 Sanpete County, Utah." (Top Flight Mot. to Transfer 3:22-26.)  
 3 Plaintiffs respond that the contractual provision only applies to two  
 4 of Plaintiffs' five claims and is unenforceable. (Opp'n 2:25-3:15,  
 5 4:16-6:10.)

6 The contractual provision the parties characterize as a  
 7 "forum selection clause" states:

8 CHOICE OF JURISDICTION, LAW AND OTHER MATTERS:  
 9 [James M. Davis] agrees to be subject to  
 10 jurisdiction of Sanpete County, Utah in any  
 11 dispute between the parties to this Agreement.

12 (Delanoy Decl., Ex. A ¶ 8.) This contractual provision is not a forum  
 13 selection clause since it only concerns jurisdiction. "When only  
 14 jurisdiction is specified[,] the clause will generally not be enforced  
 15 [as a forum selection clause] without some further language indicating  
 16 the parties' intent to make jurisdiction exclusive." Docksider, Ltd.  
 17 v. Sea Technology, Ltd., 875 F.2d 762, 764 (9th Cir. 1989) (citations  
 18 omitted). Therefore, this contractual provision does not favor  
 19 transfer.

20 **2. The Location Where The Relevant Agreements Were Negotiated and Executed**

21 Neither party specifically addresses the factor concerning  
 22 the location where the relevant agreement was negotiated and executed.  
 23 However, Plaintiffs allege they "entered into a written and oral  
 24 agreement" with Top Flight in Mount Pleasant, Utah. (Compl. ¶ 51.)  
 25 Since this allegation shows that Plaintiffs executed the contract in  
 26 Utah, this factor weighs in favor of transfer.

27 **3. State That Is Familiar With the Governing Law**

28 Defendants argue the contract contains a provision requiring  
 that Utah law governs any dispute between the parties, and therefore,

1 this factor weighs in favor of transfer. (Mot. to Transfer 8:14-23.)  
 2 Plaintiff responds "the law at issue here is federal law (Title IX)  
 3 and basic contract and negligence law." (Opp'n 6:19-20.)

4 The contract includes a "choice of law" provision, which  
 5 provides in pertinent part, "Utah law shall govern this Agreement."  
 6 (Delanoy Decl., Ex. A. ¶ 8.) Accordingly, Utah law, at a minimum,  
 7 will apply to Plaintiffs' breach of contract claim. However,  
 8 California choice of law principles will likely determine whether  
 9 California or Utah law is applicable to Plaintiffs' other state law  
 10 claims. See Shannon-Vail Five Inc. v. Bunch, 270 F.3d 1207, 1210 (9th  
 11 Cir. 2001) (stating that "[a]fter a transfer pursuant to 28 U.S.C. §  
 12 1404(a), the transferee district court generally must apply the state  
 13 law that the transferor district court would have applied had the case  
 14 not been transferred.") Therefore, this factor has not been shown to  
 15 weigh in favor of transfer.

#### 16 **4. Plaintiffs' Choice of Forum**

17 Plaintiffs elected to file suit in California, the state in  
 18 which Plaintiffs and their son, Shawn, reside. Plaintiffs choice of  
 19 forum is generally a factor weighing in favor of Plaintiffs' chosen  
 20 forum. However, where the forum lacks any significant contact with  
 21 the activities alleged in the complaint, plaintiff[s'] choice of forum  
 22 is given considerably less weight, even if the plaintiff[s] [are]  
 23 resident[s] of the forum." Cohen v. State Farm and Cas. Co., No.  
 24 C1:09-cv-1051 AWI DLB, 2009 WL 2500729, at \*3 (E.D. Cal. Aug. 14,  
 25 2009) (quotations and citations omitted).

26 California lacks significant contacts with the activities  
 27 alleged in the complaint. Plaintiffs executed their contract with Top  
 28 Flight in Utah, which is also where Johansen, a Top Flight instructor,

1 is alleged to have engaged in a sexually inappropriate relationship  
2 with Plaintiffs' son. Although deference is given to Plaintiffs'  
3 choice of forum, and therefore, this factor weighs against transfer,  
4 the weight of this factor is minimal since Utah has a much greater  
5 connection to Plaintiffs' claims than California.

6 **5. The Respective Parties' Contacts with the Forum**

7 Further, the parties' respective contacts with the forum  
8 favors transfer. Although Plaintiffs reside in California, they  
9 entered into a contract with Top Flight in Utah, under which their son  
10 was to receive services in Utah. (Compl. ¶ 51.) Plaintiffs' son was  
11 enrolled at Top Flight from late October 2007 to July 2008, which is  
12 where and when his allegedly inappropriate sexual relationship with  
13 his Top Flight instructor began. (Id. ¶¶ 12-17.) Further, each  
14 individual defendant is a Utah resident. (Id. ¶¶ 5-8.) There are no  
15 allegations in the complaint suggesting that either individual  
16 defendant has a significant contact to California. Since the  
17 "majority of the parties' contacts are with [Utah] and not California,  
18 this factor weighs in favor of transfer." Cohen, 2009 WL 2500729, at  
19 \*3.

20 **6. Contacts Relating to Plaintiffs' Claims**

21 The contacts relating to Plaintiffs' claims also favor  
22 transfer. The contract that Plaintiffs allege Top Flight breached was  
23 entered into and was to be performed in Utah and is governed by Utah  
24 law. (Compl. ¶ 51.) Further, Top Flight's alleged negligent  
25 supervision and hiring occurred in Utah as did Defendant Johansen's,  
26 alleged negligence. (Id. ¶¶ 40-41, 43-48.) The alleged "sexual  
27 harassment" on which Plaintiffs' Title IX claim is based also occurred  
28 primarily in Utah. (Id. ¶ 31-35.) Therefore, there are no meaningful

1 contacts with the Eastern District of California and this factor  
2 favors transfer.

3 **7. The Differences in the Costs of Litigation in the Two Forums**

4 Neither party has specifically addressed the differences in  
5 costs of litigating in the two forums. Therefore, it is unknown  
6 whether the cost to litigate in Utah is greater than in California.  
7 Plaintiffs argue their "main witness," Shawn, "is currently unemployed  
8 and in junior college making his attendance [in Utah] financially and  
9 pragmatically difficult." (Opp'n 7:26-8:1.) However, if this action  
10 remains in California, the individual defendants will have to travel  
11 from Utah to California. Nevertheless, Defendants have not shown that  
12 this factor favors transfer.

13 **8. Availability of Compulsory Process to Compel Attendance**

14 Defendants argue the factor concerning the availability of  
15 compulsory process to compel attendance of unwilling non-party  
16 witnesses weighs in favor of transfer since "[a]ll of the witnesses  
17 who may be called to testify via subpoena are outside the subpoena  
18 power of the California Eastern District Court." (Top Flight Mot. to  
19 Transfer 9:16-17.) Defendants further argue "Plaintiffs may call  
20 Shawn's counselor, Eldon Barnes as well as non-party students and  
21 teachers who were witnesses to Shawn's relationship with Johansen, all  
22 who are Utah residents. Plaintiffs respond that "any inability to  
23 secure witness testimony from non-party witnesses in Utah causes  
24 Plaintiffs potentially more harm" and they have "already considered  
25 this matter and opted to pursue their claims in the Eastern District."  
26 (Opp'n 7:20-23.)

27 "To demonstrate inconvenience of witnesses, the moving party  
28 must identify relevant witnesses, state their location and describe



1 their testimony and its relevance." Williams v. Bowman, 157 F. Supp.  
 2 2d 1103, 1108 (N.D. Cal. 2001) (citation omitted). Further, "it is  
 3 the convenience of non-party witnesses, rather than that of employee  
 4 witnesses, . . . that is the more important factor and is accorded  
 5 greater weight." Cohen, 2009 WL 2500729, at \*4; see also Lum v.  
 6 Scitor Corp., No. C 09-5828 JF, 2010 WL 1460314, at \*4 (N.D. Cal. Apr.  
 7 9, 2010) (stating "Defendant's employees are not third-party  
 8 witnesses, and compulsory process is unnecessary as to these  
 9 individuals.")

10 Defendants merely make reference to other "non-party  
 11 students and teachers who were witnesses to Shawn's relationship with  
 12 Johansen." This reference is insufficient to "show[] the  
 13 [in]convenience of these unnamed witnesses." Williams, 157 F. Supp.  
 14 2d at 1108. Therefore, Defendants have not shown that this factor  
 15 favors transfer.

#### 16 **9. Ease of Access to Sources of Proof**

17 Defendants argue the ease of access to sources of proof  
 18 factor favors transfer since there are limited documents in the case  
 19 and the majority of witnesses and parties reside in Utah. (Top Flight  
 20 Mot. to Transfer 9:4-13). Plaintiffs do not address this factor  
 21 specifically but argue "the central witness in this matter is the  
 22 alleged victim, Shawn, a Sacramento resident." (Opp'n 7:8-9.) While  
 23 Defendants have not sufficiently identified non-party witnesses who  
 24 reside in Utah, Defendants Johansen and Justensen are Utah residents.  
 25 Therefore, this factor does not weigh for or against transfer.

#### 26 **10. Relevant Policy of Forum State**

27 Plaintiffs also argue that transfer would "contravene  
 28 California public policy," and therefore the factor concerning the

1 relevant policy of the forum state weighs against transfer. (Opp'n  
2 5:24.) Plaintiffs, however, have not identified any relevant public  
3 policy that would be impaired by transfer of this action to Utah.  
4 Therefore, Plaintiffs have not shown that this factor weighs against  
5 transfer.

6 **IV. CONCLUSION**

7 On the balance, the section 1404(a) factors weigh in favor  
8 of transferring this action to the United States District Court for  
9 the Central Division of Utah. Utah has more significant contacts to  
10 the Plaintiffs' claims and the parties. Therefore, each Defendants'  
11 motion to transfer is granted and this action is transferred to the  
12 United States District Court for the Central Division of Utah.

13 Dated: May 26, 2010

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16 GARLAND E. BURRELL, JR.  
17 United States District Judge  
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